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No. 96-1474

# In The Supreme Court Of The United States

**OCTOBER TERM 1995**

**FREDERICK L. MASTAW,**

***Petitioner,***

**v.**

**NORFOLK & WESTERN RAILWAY COMPANY,**

***Respondent.***

**On Petition for Writ of Certiorari to the Supreme Court of Virginia**

## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

DID THE TRIAL COURT PROPERLY REFUSE TO INSTRUCT THE JURY THAT A VIOLATION OF THE FEDERAL SAFETY APPLIANCE ACT HAD OCCURRED AS A MATTER OF LAW WHERE FACTUAL DISPUTES EXISTED AS TO WHY THE TRAIN STOPPAGE OCCURRED AND WHETHER THE BRAKES OPERATED EFFICIENTLY OR DEFECTIVELY?

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## STATEMENT OF THE CASE

This case went to a jury which heard conflicting evidence and resolved all of plaintiff Frederick Mastaw's ("Mastaw") allegations in favor of the defendant Norfolk & Western Railway Company ("NW"). While Mastaw now asserts that NW's equipment was inefficient as a matter of law, the evidence plainly was to the contrary. The trial court correctly refused to instruct the jury that NW violated the Federal Safety Appliance Act (FSAA) as a matter of law. (T. 9/1 at 28.)[1] The Supreme Court of Virginia denied Mastaw's petition for appeal stating: "[T]he Court is of opinion there is no reversible error in the judgment complained of." (App. 1-2.)

Mastaw was a conductor for NW. On the day of the incident underlying this action he was working on a train bound for Roanoke from Crewe. Before leaving Crewe it is the conductor's duty to see to it that a brake line test is completed. (T. 8/30 at 87-88.) Mastaw testified that the test was done and no problem with the air brakes was detected. (Id.) The train, in fact, ran for several hours without any difficulty. When the air hose in question somehow failed, the braking system operated exactly as intended: it stopped the train. (T. 8/31 at 224-25.)

The train came to a halt with the locomotives and a few cars on the east of Possum Creek trestle and the

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[1]Because the plaintiff's petition for appeal was rejected by the Supreme Court of Virginia, no joint appendix was prepared. Reference to the Appendix attached to Mastaw's Petition for Writ of Certiorari will be made as (App. ___). Reference to the transcripts of the proceedings in the Circuit Court of the City of Roanoke, Virginia will be made as follows: T. (trial date) at ____.

remainder of the train situated on the trestle and extending westward beyond. Notably, Mastaw was not injured when the train stopped. After stoppage, Mastaw called the dispatcher to send a repair crew (T. 8/30 at 100) and then determined that he would "walk the train" to locate the problem car.[2]

The Possum Creek trestle was elevated over a wide plain. Mastaw could have sent Wills, a younger man, to do the check, or he could have decided, under the circumstances, that walking the train was unsafe. (T. 8/28 at 96-97.) Moreover, he could have used a road nearby to get to more manageable terrain, but he claimed he could not properly inspect the train that way. (T. 8/30 at 101-02.)

In fact, Mastaw testified that when he set out he did not think walking the train was dangerous under the circumstances (T. 8/30 at 95-56), notwithstanding his extensive history of back trouble. (T. 8/30 at 90.) Thus, he and Wills ventured out to locate the problem. Mastaw did not fall. However, while walking up the bank on the far side of the valley, he allegedly hurt his back. (T. 8/30 at 39.)

The train was stopped on the Possum Creek trestle for a total of one hour and five minutes. (T. 8/30 at 50.) A crew arrived from Lynchburg and promptly undertook repairs. They replaced an air hose. (T. 8/31 at 46-47.)

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[2]There was an NW rule in effect, Rule 102, which dealt with inspection of a train after a stoppage. The Rule plainly did not require Mastaw to walk the train when a stoppage occurred on a trestle or bridge. (T. 8/30 at 92.)

Mastaw repeatedly states in his petition that the hose was destroyed by NW. However, at the time the hose was replaced, no one was informed that it might be needed. Mastaw continued on his regular course of duty and did not report the alleged back ailment at the time. That night in Roanoke he notified a dispatcher. (T. 8/30 at 55.)

At trial, plaintiff offered no explanation of why the hose ruptured. Uncontradicted evidence revealed that a hose can be punctured from any number of causes including flying debris under the train, stray bullets or animal carcasses. (T. 8/31 at 223.) Mastaw opined that the problem was not even hose related, but rather that the train line had been broken near a pipe joint and that it required welding in order to be repaired. (T. 8/30 at 44-47.) He recounted seeing sparks flying from the repair crew's welding equipment. Defendant convincingly disproved this allegation by showing that there was no welding equipment present at the scene. (T. 8/31 at 44, 46-47.) The repair bill reflected merely the replacement of a hose. (T. 8/31 at 46-47.)

The jury was instructed at length (App. 41-42) on FELA issues as well as the FSAA claim. With respect to the FSAA allegations the jury was instructed, inter alia:

INSTRUCTION NO. 9

> The plaintiff also makes a Federal Safety Appliance Act claim in this case:
>
> You shall find your verdict for the plaintiff on his Federal Safety Appliance Act claim if he proved by the greater weight of the evidence:

(1) that defendant's train which went into an emergency stop over Possum Creek Bridge on August 28, 1991 had some particular defect in the brake line or that the brake line failed to function when operated with due care, in the normal, natural and usual manner; and

(2) that the specific defect or failure to function was a cause of the plaintiff's injuries.

If the plaintiff failed to prove either or both of the two elements above, then you shall find for the defendant on the Safety Appliance Act claim.

If you find your verdict for the plaintiff on the Safety Appliance Act claim, then you shall proceed to determine his damages according to the instructions the Court will give you in a moment. The negligence, if any, of the plaintiff does not bar him from recovering nor does it diminish his damages.

The jury returned the following verdict.

1. In regard to plaintiff's Safety Appliance Act, claim, we, the jury, find, based on a preponderance of the

evidence, that the defendant violated the Safety Appliance Act, and that such violation caused, in whole or in part, plaintiff's injury.

Yes ___ No _x_

2. In regard to plaintiff's FELA claim, we, the jury find, based on a preponderance of the evidence, that the defendant failed to provide plaintiff with a reasonably safe place to work, and that such failure caused, either in whole or in part, plaintiff's injury.

Yes ___ No _x_

(App. 13-14.)

## REASONS FOR DENYING THE WRIT

The questions presented by the Petition for Certiorari do not warrant review by this Court.

The central factual dispute concerned the cause of the emergency stoppage. At trial Mastaw asserted that a metal brake line had broken which mechanics had to weld in place. (T. 8/30 at 44-47, 110-11.) This factual claim was overwhelmingly rebutted. (T. 8/31 at 44, 46-47.) NW provided convincing evidence that the failure of an air hose was the reason for the emergency stop and that outside forces such as bullets, or animal carcasses -- wholly beyond

NW's control -- could have caused the failure. (T. 8/31 at 223.) The jury was left to resolve whether the brakes were efficient or whether a violation of the FSAA occurred. The jury properly and reasonably ruled for NW under the facts of this case.

Mastaw misreads a series of FSAA cases in which plaintiff's verdicts were overturned by trial judges who ruled, as a matter of law, for the employer. The lesson of those cases is that a jury issue is presented where evidence is disputed as to the existence of an alleged violation of the FSAA. When that lesson is applied to this case, the fact-finder's ruling for NW below must be upheld, and Mastaw's Petition for Writ of Certiorari denied.

## I. THE TRIAL COURT PROPERLY SENT THE FACTUAL DISPUTE REGARDING THE ALLEGED FSAA VIOLATION TO THE JURY.

It was entirely proper for the trial court to refuse to give an instruction that, as a matter of law, NW violated the FSAA.[3] Federal case law which governs actions brought under the Federal Safety Appliance Act clearly indicates that the question of a violation was, at best, a jury

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[3] The FSAA and the Federal Railroad Administration regulations govern power air brakes and the procedures required to inspect air brake lines. Under the FSAA, as it existed in 1991, locomotive engines used in interstate commerce were required to have appliances for running power or train brakes and have a sufficient number of cars with power or train brakes so that the brakes could be controlled by the engineer. 45 U.S.C. §§ 1, 9.

The regulations setting forth the required testing of the air brake system are quite lengthy and include initial terminal road train air brake tests, 49 C.F.R. § 232.13, and running tests. 49 C.F.R. § 232.16.

issue -- a question on which the jury found in favor of NW.

Numerous decisions from this Court and others confirm that a jury question is presented when there is a dispute as to the defective or inefficient nature of railroad equipment. In Myers v. Reading Co., 331 U.S. 477, 484 (1947), a hand brake failed to function when engaged by the plaintiff. The jury reached the factual conclusion that the brake was not "an efficient brake." 331 U.S. at 481. The trial court overturned that ruling as a matter of law. While there was a dearth of testimony describing any "precise mechanical defects in the structure of the brake," 331 U.S. at 484, there was sufficient evidence from which the jury might infer that the brake was defective or inefficient. The Court, therefore, overturned the trial court's judgment and reinstated the jury's verdict:

> The questions at issue were questions of fact. The jury was entitled to draw inferences from the evidence. From the evidence presented, the jury reasonably could find, as it did in its special verdict, (1) that the brake was not an efficient brake, and (2) that the fact that the brake was not an efficient brake contributed to or caused injury to the petitioner. In the face of this, the trial court erred in entering a judgment for the respondent in accordance with the motion for a directed verdict.

331 U.S. at 476-77. By contrast, here, the jury resolved factual disputes for the defendant. Its verdict on the contested factual matters, similarly, must stand.

In Grogg v. Missouri Pacific Railroad Co., 841 F.2d 210 (8th Cir. 1988), the plaintiff brought an FSAA claim alleging she was injured when the train on which she was the engineer went into an emergency stop. Her evidence was that the train braked unexpectedly when an air hose failed to remain attached to its train car. The head brakemen testified that the air hose "had been busted.... It had been torn completely off the car." Id. at 213. No one knew the cause of the air hose failure.

The Court held that the trial court erred when directing a verdict for the railroad, but said a jury question was created:

> These facts would allow the jury to find that the air hose failed to function "in the normal, natural and usual manner" because it separated from the car at a time when it should not have done so. * * * Missouri Pacific's theories concerning more remote causes of the hose failure are theories the jury could choose to believe or not, and viewing the evidence as we must in Grogg's favor, these theories are more appropriately presented in closing argument.

Id. (Emphasis added; citations omitted.) The Grogg Court, consistent with this Court's ruling in Myers, ruled that the issue was a jury question. See also Metcalfe v. Atchison, Topeka, and Santa Fe Ry. Co., 491 F.2d 892, 897 (10th Cir. 1974) (holding jury question existed with respect to misaligned drawbar); New York, New Haven & Hartford Railroad Co. v. Leary, 204 F.2d 461, 465 (1st Cir.), cert. denied, 346 U.S. 856 (1953) (evidence of defect sufficient to submit violation of FSAA to the jury).

Petitioner's suggestion that the Supreme Court of Virginia is somehow confused or inconsistent in its application of the FSAA is mistaken. In N&W Ry. Co. v. Keatley, 211 Va. 507, 178 S.E.2d 516 (1971), Virginia's highest court observed: "Unlike the Employers' Liability Act, which imposes liability for negligence, the Safety Appliance Act imposes absolute liability upon proof of defective or inefficient safety equipment." 211 Va. at 509, 178 S.E.2d at 517. The Court went on to state that, under the facts of Keatley, the question of whether the railroad violated the FSAA was properly submitted to the jury. 211 Va. at 510, 178 S.E.2d at 518. The Supreme Court of Virginia's rejection of Mastaw's petition in this case is entirely consistent with the outcome in Keatley and with this Court's prior precedent: where there exists a dispute as to the efficiency or defectiveness of equipment, the jury is the final arbiter of whether the Act was violated. Here, such a dispute plainly existed.

Mastaw misapplies a series of FSAA cases in which plaintiffs' verdicts were overturned by trial judges who disregarded jury verdicts and ruled, as a matter of law, for the employer. The lesson of these cases is that a jury issue generally exists where evidence is disputed as to alleged violations of the FSAA. When that lesson is applied to this case, the fact-finder's ruling for NW below must be upheld, and Mastaw's petition for writ of certiorari rejected. The cases do not stand for the proposition advocated by Mastaw -- that every unplanned brake stoppage correlates, automatically, into a violation of the FSAA.

For example, in Coray v. Southern Pacific Co., 335 U.S. 520 (1949), the brake locked when air escaped from a valve that was so badly worn that a nut became disconnected. 335 U.S. at 521. This Court held: "In this

case where undisputed evidence established that the train suddenly stopped because of defective air-brake appliances, petitioner was entitled to recover if this defective equipment was the sole or a contributing proximate cause of the decedent employee's death." 335 U.S. at 523 (emphasis added). The Court further stated: "These air brakes were defective; for this reason alone the train suddenly and expectedly stopped. . ." 335 U.S. at 524. Thus, in Coray there was no factual dispute as to the FSAA violation and no jury question was presented.

Similarly, in O'Donnell v. Elgin, Joliet & E.R. Co., 338 U.S. 384 (1950), there was uncontradicted testimony that there was a fracture of a coupler indicating an old defect. 338 U.S. at 393. While the Court admonished that the railroad's liability under the FSAA was unaffected by negligence or diligence issues, it further stated:

> We do not say that a railroad may never effectively defend under the Act by showing that an adequate coupler failed to hold because it was broken or released through intervening and independent causes other than its inadequacy or defectiveness; such, for example, as the work of a saboteur.

338 U.S. at 394 n.7. See also Norfolk and Western Ry. Co. v. Hiles, 116 S. Ct. 890 (1996) (railroad not liable as a matter of law under FSAA for injuries suffered by railroad employee while trying to straighten misaligned drawbar).

This case featured a dearth of evidence explaining the alleged inefficiency of the brake in question. The brakes had been checked the morning of the incident and had operated flawlessly until arrival at the Possum Creek

trestle. Mastaw argued that a metal train line broke and required welding. (T. 8/30 at 110-11.) NW countered with overwhelming evidence that this was untrue. (T. 8/31 at 44, 46-47.) Evidence suggested that a hose ruptured, and a likely cause of this problem was flying debris or stray gunshots. (T. 8/31 at 223.)[4] The jury was called upon to resolve the factual dispute and to determine whether the airbrakes were efficient. While the jury was free, based upon the stoppage, to infer a violation, it was not required to do so in the wake of conflicting evidence.

Just as an automotive windshield that fractures (rather than shatters) when struck by a large rock is not defective, the jury here was entitled to find that the braking system was neither defective nor inefficient when activated by outside forces. The FSAA should not be read to make every emergency activation of the braking system -- caused

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[4]At page 8 of his Petition, Mastaw now alleges that his co-worker, Wills, stated that the metal portion of the hose had cracked. On cross-examination, Wills conceded as follows:

> Do you remember as you sit here today what was causing that air hose to let off air?
>
> A I can't exactly remember where it was broke. It may have been from the statement or -- I just can't pinpoint exactly what it was.
>
> Q Today as you sit here you don't know what was wrong with that hose.
>
> A I know it had a leak. Now, where the leak was coming from, I don't know. I couldn't say.

(T. 8/29 at 100, see also T. 8/29 at 102.)

by gunshots, earthquakes, or saboteurs -- an automatic violation of the FSAA.

Moreover, here, Mastaw's alleged injury was quite remote from the brake stoppage. Knowing of his lengthy history of back problems (T. 8/30 at 90), Mastaw chose to walk hilly terrain which he was not required to do. (T. 8/28 at 97.) In fact, he did not fall, but claims to have hurt his back merely by walking up the incline. (T. 8/30 at 39.) Manifestly, the jury reached the correct verdict in finding that the FSAA had not been violated and that any such violation would not be a proximate cause of his injuries. (App. 13-14.)

Indeed, under the facts of this case the jury easily could have returned a verdict for NW merely by determining that plaintiff's decision to traverse the area under the trestle was the sole cause of his alleged injuries. Emig v. Erie Lackawanna Ry. Co., 350 F. Supp. 986, 987 (W.D. Pa. 1972), aff'd, 485 F.2d 679 (1973):

> Even under the Safety Appliance Act, where the defect in a particular appliance is negligence per se, the fact that an employee chooses a dangerous or risky manner in which to remedy the defect and consequently suffer [sic] injury does not impose liability on the employer.

Id. at 988; Beimert v. Burlington Northern, Inc., 726 F.2d 412, 414 (8th Cir.), cert. denied, 467 U.S. 1216 (1984).

This case does not warrant further review.

## CONCLUSION

This case involves application of long-settled principles to peculiar facts. A jury question was presented as to the existence of a violation of the FSAA. The jury's verdict should not be disturbed.

For the foregoing reasons, the Petition for Certiorari should be denied.

Respectfully submitted,

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